IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted] 72

JOHN HENRY COLEMAN and OTIS STEPHENS,

Petitioners,

v.

STATE OF ALABAMA,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE PETITIONERS

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CITATIONS

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Opinions Below

Petitioners found guilty of a felony, to-wit: assault with intent to murder, in the Circuit Court of the Tenth Judicial Circuit of Alabama and sentenced to twenty years on May 3, 1967. (A. 3, 11)* The opinion of the Court of Appeals of Alabama is reported in 211 So. 2d 917, April 23, 1968; rehearing denied May 21, 1968. Certiorari denied by Supreme Court of Alabama on June 20, 1968. 211 So. 2d 927.

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* (A. ___) Denotes Appendix; (R. ___) Denotes Record.

Jurisdiction.

Judgment of affirmance rendered by Court of Appeals of Alabama on April 23, 1968, rehearing denied May 21, 1968. Certiorari denied June 20, 1968. Petition for Writ of Certiorari filed in Supreme Court of the United States and docketed September 17, 1968. Jurisdiction of this Court is invoked under the provisions of Title 28, Section 1257(3), United States Code. Certiorari granted March 24, 1969.

Constitutional Provisions Involved

Constitution of the United States

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Alabama Statutes Involved

Code of Alabama, 1940 (Recompiled 1958)

Title 15

Preliminary Examination

SECTION 133. EXAMINATION; HOW CONDUCTED. The magistrate before whom any person is brought, charged with a public offense, must, as soon as may be, examine the complainant and the witnesses for the prosecution on oath, in the presence of the defendant; and after the testimony for the prosecution is heard, the witnesses for the defendant must be sworn and examined.

SECTION 134. RIGHT OF DEFENDANT TO APPEAR BY COUNSEL; EXAMINATION; HOW CONDUCTED. The defendant may appear by counsel, and the magistrate may, on application, direct the witnesses for the prosecution or defense, or both, to be kept separate, so that they cannot hear the evidence, or converse with each other until examined; such examination is under the control of the magistrate, and should be so conducted as to elicit the facts of the case.

SECTION 135. TESTIMONY OF WITNESSES REDUCED TO WRITING AND SUBSCRIBED. The evidence of the witnesses examined, both for the state and for the defendant, must be reduced to writing by the magistrate, or under his direction, and signed by the witnesses respectively.

SECTION 136. TESTIMONY PRESERVED AND DELIVERED. The testimony, when taken as provided in section 135 of this title, must be carefully preserved by the magistrate, and must be delivered by him to the clerk of the court having jurisdiction of the cause, . . .

SECTION 138. ALL WITNESSES EXAMINED. It shall be the duty of the magistrate to examine all witnesses having any knowledge of any facts relevant to such investigation, whether such witnesses were summoned in behalf of the state or the defendant.

SECTION 139. WHEN DEFENDANT MUST BE DISCHARGED. If upon the whole evidence it appears to the magistrate that no offense has been committed, or that there is no probable cause for charging the defendant therewith, he must be discharged.

SECTION 140. IF PROBABLE CAUSE SHOWN, DISCHARGED ON BAIL, OR COMMITTED. If it appears that an offense has been committed, and that there is probable cause to believe that the defendant is guilty thereof, he must be discharged, if the offense is bailable, upon giving sufficient bail, but if sufficient bail is not given, or if the offense is not bailable, he must be committed to jail by an order in writing.

Questions Presented

1. Were the petitioners denied their constitutional rights, as guaranteed them by virtue of the Sixth Amendment and Fourteenth Amendment, by reason of their being denied the right to have counsel appointed to represent them at their preliminary hearing, where it was shown that petitioners were indigent and unable to employ counsel, were in possession of little or no formal education, no legal training and where testimony, vital to their defense, could have been elicited, transcribed and preserved for use in their defense; but which has been lost forever because of failure to have been represented by counsel?

2. Were the petitioners denied due process of law as guaranteed by the Fourteenth Amendment by reason of the pretrial lineup being conducted in such an unnecessarily suggestive manner as to be conducive to irreparable mistake in identification?

Statement of the Case

The petitioners were arrested in Birmingham, Jefferson County, Alabama on September 29, 1966. They were charged with Assault with Intent to Commit Murder, in that they "unlawfully and with malice aforethought, did assault Casey Frank Reynolds with the intent to murder him." (A. 1)

The assault occurred on July 24, 1966 at approximately 11:00 P.M. (A. 56) The victim, Casey Frank Reynolds, and his wife, Jeanette, were repairing a flat tire on their

car (R. 127), which was parked alongside Green Springs Highway in Birmingham (A. 56), when three males approached from a parked car across the highway. (R. 131) A shot was fired and Reynolds was struck. (R. 132) One of the assailants then stated "Get down into the woods." (R. 132) As a vehicle approached on the highway, the three assailants fled back to the parked car. (R. 134) As they fled one of the assailants turned, fired and struck Reynolds again. (R. 136) Reynolds was taken to a local hospital by a passerby. (R. 137)

Two or three days later, while in the hospital, Reynolds informed Sheriff's detective Fordham that he didn't believe he could identify his assailants. (R. 140) Reynolds told Fordham that all he could say was that they were black males, same age and same height. (A. 21) One of them wore a hat. Weeks later, after being released from the hospital, Reynolds viewed mug shots at the Sheriff's office and once again stated that he didn't think he could identify them. (A. 23, 24, 25) Mrs. Reynolds did not view the mug shots having already informed the detectives that she "definitely" could not identify the assailants. (A. 22)

On September 29, 1966, Reynolds was called by a sheriff's detective and requested to come to the City Jail. (A. 60) Reynolds said that he did not remember what the officer said; but "I took it for granted that they had the ones who shot me." (A. 60) At the lineup Reynolds viewed six black males only one of which, John Coleman, had a hat on. (A. 61, 62) Reynolds requested that the participants in the lineup step forward and repeat the words, "Get down into the woods." Only the petitioners who were among those in the lineup, were commanded by the officers to step forward and repeat the phrase. (A. 53, 61, 73,

75, 81) Detective Limbaugh said, "The audio portion of the intercom was distorted and he didn't believe it was fair." (A. 66) John Coleman was singled out by the officers to step forward and adjust his hat back and forward on his head. (A. 61, 62) Then and only then did Reynolds state that petitioners were two of the men who had assaulted them.

It is significant to note that between July, 1966 and October, 1966, banner headlines were exhibited in local newspapers telling of the assault and of the tremendous manhunt being conducted in an effort to locate the assailants. Local fund drives were initiated by civic groups to finance and subsidize the medical expenses of Reynolds, who was then a student.

On October 14, 1966, the petitioners were brought before the Honorable Robert W. Gwin, Judge of Jefferson County Criminal Court, for a preliminary hearing. (A. 7, 8, 15, 16) The petitioners appeared without counsel and were financially unable to employ counsel. Witnesses were examined by an Assistant District Attorney whose full time responsibility is to prosecute cases at preliminary hearings. The petitioners testified at the hearing. No witnesses were called on behalf of petitioners. No record or transcript was made of the proceedings by the Court. (A. 68-72) The petitioners were bound over to the Grand Jury and bond was set at ten thousand dollars ($10,000.00).

The Grand Jury indictment was returned on November 11, 1966. (A. 1, 9) Present counsel was appointed to represent the petitioners on November 18, 1966. (A. 2, 3, 10, 11) Petitioners were arraigned on December 1, 1966 and a plea of not guilty was entered. (A. 2, 3, 10, 11) A motion to suppress was filed by petitioners' counsel on January

30, 1967. (A. 7, 8, 15, 16) A hearing was held on February 24, 1967 on the motion. (A. 7, 8, 15, 16) The motion demanded the suppression of all statements and discovery evidence obtained by the State from the petitioners while testifying at the preliminary and prior to preliminary. (A. 7, 8, 15, 16) It moved for dismissal of the case for failure to provide counsel at the preliminary and at the lineup. Also, to suppress the identification made by Reynolds. Included were alleged confessions which were suppressed by the court; but, all other aspects of said motion were denied. (A. 7, 8, 15, 16)

During the course of the motion, testimony was taken as to circumstances under which the lineup was conducted; which has already been stated in this portion of the brief (*supra*). The court allowed proffered testimony which was offered by the defense pertaining to the question of whether or not the preliminary hearing is a "critical stage of proceedings in a criminal case in Alabama." This testimony was offered in the form of three lawyers, who in the trial court's opinion, "are qualified criminal lawyers practicing at the Bar with many years of experience". These lawyers would have testified that in their opinion the preliminary hearing is the "most" critical stage of proceedings in Alabama from the standpoint of the defense. (A. 68-72) Further it was shown that ninety-five percent of all cases in Jefferson County, that reach the grand jury, come by way of the preliminary hearing whether they are indicted or not indicted by the grand jury. Petitioners' motion was denied. (A. 68-72)

The petitioners were tried on May 1 and May 2, 1967. On May 2, 1967, they were convicted by the jury and the judge sentenced them to twenty years. Notice of appeal

given May 3, 1967. Motion for new trial overruled on June 29, 1967. (A. 2, 3, 10, 11) On April 23, 1968, Court of Appeals of Alabama affirmed the trial court. Rehearing denied May 21, 1968. Certiorari denied by Supreme Court of Alabama on June 20, 1968.

ARGUMENT I

Examine, briefly, this court's decisions relating to an accused's right to counsel at the various stages of criminal prosecution in light of the Sixth Amendment; and what this court has chosen to call "critical stages." The earliest possible stage is the *arrest* or more properly said, "when the light of suspicion begins to focus." What has this Court said? He is entitled to counsel, retained or appointed. *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. Ed. 2d 977. The next stage which many times follows is the *lineup.* What has this Court said? He is entitled to counsel, retained or appointed. *Wade* v. *U. S.,* 87 U.S. 1926; *Stovall* v. *Denno,* 384 U.S. 1000, 16 L. Ed. 2d 1014. What of the *arraignment?* Yes! He is entitled to counsel, retained or appointed. *Hamilton* v. *Alabama,* 368 U.S. 52, 82 S. Ct. 157. Next the *trial.* Yes! Retained or appointed. *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799. *Probation hearing.* Yes! v. , —— U.S. ——, —— S. Ct. ——, —— L. Ed. ——. *Appeal.* Yes! *Douglas* v. *California,* 372 U.S. 353, 83 S. Ct. 814. *Probation revocation.* Yes! *Mempa* v. *Rhay,* 88 Sup. Ct. 254.

The only stage omitted is the preliminary hearing, except in Maryland. *White* v. *Maryland,* 373 U.S. 59, 83 S. Ct. 1050. There the court said it was critical because a plea was required. It was determined to be "not critical" in

Pointer v. *Texas,* 380 U.S. 400, 855 S. Ct. 1065; because a plea was not required. However, this Court said, "whether there might be other circumstances making this Texas preliminary hearing so critical to the defendant as to call for appointment of counsel at that stage we need not decide on this record, and that question we reserve." It is the *question reserved* that we ask the Court to decide in this instant case. The statutes of the States of Texas and Alabama are substantially the same, but the reasons brought out and set forth are substantially larger than simply whether a plea is required or probable cause determined and bail set.

It is well founded and understood that had the petitioners been tried in the Federal Court, just a few blocks down the street, then they would have been entitled to counsel and would have received it had it been desired. *Ross* v. *Shica,* 380 F. 2d 577. Is it "equal and exact" justice for one to be entitled to counsel in one block while a few blocks down the street he is not? Is that "due process?" We think not.

Should one be doubtful, mind you only for a second, whether the preliminary hearing is a critical stage or not, ask one question. Have you ever heard of a rich man or a man with the ability to retain counsel appearing at a preliminary *without* counsel? The question answers itself. To provide counsel, as this Court has done in the other areas specifically enumerated is very much like affording a doctor for surgery, but none for the emergency room. Many trial advocates, such as the ones whose testimony was offered before the trial judge in this case, believe that the preliminary hearing is the *"most"* critical stage of proceedings. As a matter of fact, in oral argument before

the Court of Appeals of Alabama, the Assistant Attorney General admitted this stage to be critical. I understand he is no longer with the Attorney General's office.

Even though it may be said that a plea is not required or even allowable; it can still be said that an absolute plea in bar may be provable at the preliminary, not involving contradictory or variable facts, such as a Plea in Abatement (lack of jurisdiction) or the Statute of Limitations. Probable cause means more than the fact that a crime has been committed. It remains that it must have been committed within the jurisdiction of the Court and timely brought by the proper pleading, as well as many other elements. *DeGraffenried* v. *State,* 28 Ala. App. 291, 182 So. 482; *Phillips* v. *Morrow,* 210 Ala. 34, 97 So. 130; *Culligan* v. *State,* 29 Ala. App. 29, 191 So. 405. Alabama Code, Title 15, Sections 220, 221.

The reasons supporting the fact that the preliminary hearing is a critical stage of the proceedings are as follows:

1. It is the first opportunity the defendant has to be adequately informed by an allegedly impartial person, of that which he is charged.

2. The first opportunity to be confronted by those who will testify against him.

3. It is the first opportunity to examine those who will testify against him and have their testimony reduced to writing.

4. It is the first opportunity to subpoena persons to testify in his behalf.

5. It is his first opportunity to see the warrant which has incarcerated him.

6. It is his first opportunity to see pleadings of various kinds and nature which may appear.

7. He must elect to testify or not to testify, which also may be reduced to writing, and used against him at a later date; or may lead to State's discovery of evidence which would not have been found had defendant not testified.

8. He must elect to waive or not to waive his preliminary hearing.

9. He must decide what technical defenses are available to him and how to use them most effectively.

10. It is his first opportunity to be discharged on bail.

(a) In the event of a capital case, he must introduce evidence or argue to the magistrate under the existing evidence that the proof is not strong and the presumption is not great that he would receive the death penalty if convicted; therefore, he is entitled to bail.

(b) In the event of a non-capital case, he may introduce evidence mitigating the circumstances which would cause a reduction in the amount of bond and bring it within reach where otherwise it would have been out of reach.

11. It is his first opportunity to have the witnesses examined separate and apart from one another and to have their testimony limited to what is admissible.

12. It is his first opportunity to prevent the introduction of inculpatory statements illegally obtained,

which many times serves as the only foundation for determining probable cause.

13. It is a forum in which a record may be built and from which an effective defense may be engendered.

14. If a plea of insanity is contemplated, the court has the power to commit the defendant for a lunacy inquisition or psychiatrie examination rather than sitting in jail for months waiting for the trial court to do it.

15. It is a means by which the defendant can discover the evidence upon which the state intends to build a case.

16. It is imperative that counsel be appointed early in the proceedings before the witnesses become forgetful and the facts grow cold.

17. It affords an opportunity to effectively cross-examine or examine one's own witness and preserve his testimony for future use should said witness not be available at trial.

The Sixth Amendment clearly and unequivocally says "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." This Court has used this phrase time and time again to uphold the requirement of appointment of counsel. The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive

safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him. *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. Ed. 2d 799. One charged with a crime is as much entitled to assistance of counsel in preparing for trial as at the trial itself. The duty to appoint counsel is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case. Even the intelligent and educated layman has small and sometimes no skill in the science of the law. He requires the guiding hand of counsel at every step in the proceeding against him. *Powell* v. *Alabama,* 278 U.S. 45, 77 L. Ed. 158, 55 S. Ct. 55. Certainly a person has a right to reasonable notice of a charge against him, an opportunity to be heard in his defense, a right to his day in court and these rights include as a minimum "the right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682.

One has no way of knowing just how beneficial counsel would have been to petitioners at their preliminary hearing; since they were not afforded the right to counsel. Any definitive benefit would have to be pure speculation since none of us are clairvoyant. However, it is for the foregoing reasons set out upon these pages that it was an absolute necessity not only for these petitioners, but for all defendants. Since there is no way to correct the injustice done particularly by granting another preliminary hearing with counsel; we, therefore, urge this court to reverse and render said case.

ARGUMENT II

Petitioners concede that the lineup in question occurred before June 12, 1967 (A. 65), therefore, the holding of *U. S.* v. *Wade,* 87 U.S. 1926, pertaining to the right to counsel at a pretrial lineup does not apply. However, on the same day that *Wade, supra,* was decided this Court rendered another significant opinion. In *Stovall* v. *Denno,* 388 U.S. 293, 87 S. Ct. 1967, the court said that regardless of the fact that a lineup occurred before the date established for *Wade, supra,* and *Gilbert* v. *California,* 87 S. Ct. 1951, to apply prospectively, one is still entitled to relief in any event in a situation where the confrontation conducted was "so unnecessarily suggestive and conducive to irreparable mistake in identification that he was denied due process of law."

Petitioners are not asserting through this question that the lineup in and of itself is unjust. The court had adequately established in a multitude of cases including *Wade, supra, Gilbert, supra* and *Stovall, supra,* that a lineup does not violate an accused's privilege against self-incrimination. Petitioners also agree that to require certain acts to be performed during the lineup is in some cases constitutionally acceptable (i.e. putting on eyeglasses, *People* v. *Tomaszek,* 204 N.E. 2d 30; speaking in order to allow the identifier the opportunity to evaluate a voice, *U. S.* v. *Wade,* 87 U.S. 1926, giving of handwriting exemplars, *Gilbert* v. *California, supra*). The instant case does present additional facts which place it beyond the recognized constitutional lineup and into an area this court described in *Stovall, supra,* as suggestive and conducive to mistake in iden-

tification. It is because of these additional facts that the petitioners seek the relief of this court.

The petitioners interpret the *Stovall* v. *Denno*, 388 U.S. 293, 87 S. Ct. 1967, opinion by this court to mean that the defendant so claiming the unjust confrontation must bear the burden of proving that "the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistake in identification that he was denied due process of law." In view of the court's own standard as set out in the *Stovall, supra,* opinion, that of looking to "the totality of the circumstances" the petitioners assert that the condemning identification of the petitioners by the witness who for two months and seven days could not even describe his assailants (A. 23) was most surely a product of suggestive lineup methods. Petitioners contend the lineup was suggestive in that: (1) The police notified the witness in such a suggestive manner that in the witness's own words he "took this point for granted" when asked if the police told him they had the boys who shot him. (A. 60) (2) The petitioners and one other accused of committing this assault were the only participants in the lineup required to repeat the words used by the assailants on the night of the assault. (A. 53, 61, 73, 75, 81) (3) Petitioner, John Coleman, was the only person in the lineup required to wear a hat and was also required to move it about on his head. This was required in spite of the fact the police knew that one assailant had worn a hat. (A. 61, 62) It is asserted by the petitioners that such a suggestive lineup is certainly contrary to this court's notion of decency, fairness and fundamental justice and if so, it, of course, must be prohibited by the Constitution. *Rochin* v. *California*, 342 U.S. 165.

In *Palmer* v. *Peyton*, 359 F. 2d 199, the opinion says concerning any prior suggestions to persons who will be a witness, ". . . prior suggestions will have most fertile soil in which to grow to convictions. This is especially so when the identifier is presented with no alternative choice." Practicality must be observed in cases concerning suspects who are so unique, such as a one-armed, blue-eyed, red-headed albino Negro, that an alternative choice would not be possible. Here, however, it would have been very easy to have all six of the persons in the lineup to read or speak from some text not as suggestive as words used during the assault if a fair and just lineup were the true goals of the officers. It would have also been quite simple to either provide hats for all of the persons in the lineup or to have removed the petitioner's hat before presenting him to the witness as one alone in six with a hat similar to the witness's assailant. In *Pearson* v. *U. S.*, 389 F. 2d 684, the court said that the fairness of a pretrial lineup depends upon a number of factors such as the general age, racial, and other physical characteristics of the participants, including any body movements, gestures, or verbal statement that is required. In light of *Palmer* and *Pearson, supra,* where so much of what is considered as fairness is determined by the availability of an alternative choice how can petitioners' two man act in a cast of six be considered fair? By failing to require the other four men in the lineup to participate in the same or even a like manner as the petitioners, the officers surely provided the "fertile soil" where suggestion grows to conviction.

In *Crume* v. *Beto*, 383 F. 2d 36, the court said that evidence of identification resulting from a lineup, in order to be admissible, aside from right to counsel or privilege

against self-incrimination, recognized in *Stovall, supra,* must meet due process standards of fundamental fairness. Recognizing this principle set out in *Crume* v. *Beto, supra,* and first established in *Stovall, supra,* Medina, J. says in *Rutherford* v. *Deegan,* 4 Cr. L. Rep. 2350: "The inquiry in all these due process of law identification cases arising before Wade, supra, is simple, direct, and unequivocal: was the lineup or showup, without notice to or the presence of counsel, 'on the totality of circumstances surrounding' the confrontation 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification'? We proceed to apply this test to the facts of the case before us." The petitioners assert that when the facts of the present case are applied to the test set out in *Rutherford* v. *Deegan, supra,* the violation of due process will be clear. Looking to the "totality of the circumstances" the facts are: (1) The identifying witness could not describe his assailants except for color. (A. 21) (2) What little he did remember was completely different from the petitioners' actual appearance. (A. 88, 89) (3) The witness's wife who was at his side during the assault would not even attempt to identify anyone. (A. 22) (4) The witness told the police that he doubted that he could ever identify anyone. (A. 23, 24, 25) (5) The witness was called to the police station to view the lineup in such a way that he testified that "he took it for granted" the police had the man who shot him. (A. 60) (6) The witness could make no independent identification of anyone in spite of the fact he "took it for granted" his assailant was there. (7) Petitioners were the only ones called upon to do any specific act or make any gesture during the lineup.

Petitioners' counsel contends that taking into consideration the standard set out in *Stovall* v. *Denno, supra,* of determining each case by looking to the "totality of the circumstances surrounding it," the witness's identification of the petitioners in this case is clearly the product of impermissible suggestion and any identification arising out of such a lineup should not be admitted.

Counsel respectfully insists that the trial in this instant cause was a mere pretense after the state authorities had contrived a conviction resting solely upon the identification at the lineup as it was conducted in this instant case.

The due process clause of the Fourteenth Amendment requires that state action shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. This Honorable Court should not permit the petitioners to be hurried to conviction under mob domination, where the whole proceeding is but a mass, without supplying corrective process.

The facts and circumstances surrounding this lineup, while in custody and control of the law enforcement authorities, constitute such a violation of the accused's constitutional rights that the tainted identification at the trial of this cause should not have been admitted into evidence for consideration by the jury.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of Alabama should be reversed, with direction to dismiss the action.

Respectfully submitted,

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